**LEPANG ENTERPRISE SDN BHD**

**v.**

**GOH AH LUN**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[SUIT NOS: D1-22-241-92 & D3-22-228-92]
28 JUNE 2001

***CIVIL PROCEDURE:*** *Writ of summons - Renewal - Power of Court - Whether could issue successive writs through a single application - Whether could only issue writ for 12 months at any one time - Rules of the High Court 1980 O. 3 r. 5, O. 6 r. 7, O. 12 r. 6(1)*

***CIVIL PROCEDURE:*** *Writ of summons - Striking out - Writ extended for six consecutive years at one time - Whether contravened the Rules - Application for extension made after limitation had accrued - Whether extension unjust - Whether writ to be struck off - Rules of the High Court 1980 O. 6 r. 7, O. 92 r. 4*

***WORD & PHRASES:*** *"from time to time" - "at any one time" - Order 6 r. 7 Rules of the High Court 1980*

By a writ of summons dated 18 February 1992 ('1992 writ'), the plaintiffs in suit D3-22-228-92 ('suit D3') sued Lepang Enterprise Sdn Bhd ('Lepang') and two others ('first and second defendants') for breach of contract. The 1992 writ was duly served on Lepang, but service on the first and second defendants had not been effected. The facts showed that the plaintiffs did not actively pursue the claim against the first and second defendants and consequently, for some six years, did not renew the 1992 writ. However, on 17 July 1998, the first plaintiff sought to extend the validity of the 1992 writ, and applied, *vide* one single application, to extend the writ for six successive years. The application was allowed by the learned senior assistant registrar and the 1992 writ was extended from 18 February 1993 to 17 February 1999 by way of six consecutive yearly renewals.

The first and second defendants applied to strike out the 1992 writ arguing that: (i) its extension was fatally flawed as the court had no power to grant successive extensions the way it did, and in so doing had contravened O. 6 r. 7(2) Rules of the High Court 1980 ('RHC'); and (ii) the application ought to be disallowed as the extension, having been made after the period of limitation had set in, was unjust. The first plaintiff retorted that quite apart from O. 6 r. 7 RHC, there is wide power under O. 3 r. 5 RHC conferred

upon the High Court to extend time, and that, any restriction expressed in O. 6 r. 7 could be overcome by resorting to O. 92 r. 4 RHC.

Before the learned judge, the primary questions that arose were: (i) whether the court's power under O. 6 r. 7(2) RHC is limited only to extending the validity of the 1992 writ for a maximum of 12 months before its expiry; and (ii) whether the extensions granted under the circumstances had caused an injustice to the first and second defendants, such that the court ought to exercise its inherent power under O. 92 r. 4 RHC to prevent such injustice.

**Held:**

**[1]** Order 6 r. 7 RHC provides that where a writ has not been served on a defendant, the court may by order extend the validity of that writ 'from time to time for such period not exceeding 12 months at any one time'. (p 406 e-f)

**[1a]** The words "from time to time" and "at any one time" would denote for each period an extension which must not exceed twelve months, and that there must be a distinct and separate application. Therefore, the court's power under O.6 r. 7 RHC is limited to extending the validity of the writ for a maximum of 12 months at any one time. There is no power to grant two or more successive renewals to bring the writ up to date. (p 408 a-b)

**[2]** The plaintiff had sought to extend the validity of the 1992 writ in six successive renewals in one single application. That being so, the extension of the validity of the writ was made contrary to O. 6 r. 7 of RHC. (p 407 h-i)

**[3]** The plaintiff is guilty of undue delay. Further, by the time the first application was made for renewal on 17 July 1998, the claim had become barred by limitation and granting the application under the circumstances would cause an injustice to the first and second defendants. Grave injustice has indeed been caused to the first and second defendants when the writ was renewed, as they have been deprived of a limitation which had accrued well before the application for extension was made. (p 409 c-d)

**[4]** In any case, the plaintiff has not complied with O. 6 r. 7(3) RHC because the writ that was served on the first and second defendants after its validity was extended was not endorsed in accordance with that rule. In the circumstances, to prevent injustice, the court would exercise its inherent power and strike out the 1992 writ. (p 409 g-h)

*[Writ struck out.]*

**Case(s) referred to:**
*Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773* ***(dist)***
*Lee Kah Hong & Anor v. Teoh Tiang Guan & Anor [1971] 2 MLJ 223* ***(foll)***
*Lim Wan Hooi v. Ismail Hassan [1965] 2 MLJ 101* ***(refd)***
*The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v. QBE Insurance (International) Ltd [1989] 1 MLJ 1* ***(foll)***

**Legislation referred to:**
Civil Law Ordinance 1956, s. 7(5)
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 3 r. 5, O. 6 r. 7(1), (2), (3), 8(2), O. 8 r. 1, O. 12 r. 6(1), O. 92 r. 4

*For the defendant/appellant - KY Ho; M/s Kumar Jaspal Quah & Aishah*
*For the plaintiff/respondent - Kalpana Chandran (Rizalman Bahaman); M/s Liow & Co*

*Reported by WA Sharif*

## JUDGMENT

**Mohd Ghazali J:**
These two actions were consolidated *vide* court order dated 17 March 1993.

**The 1st Action (D1-22-241-92)**
This action ("the D1 suit") was filed on 19 February 1992. In this action the plaintiff's claim against the defendant is as follows:

(a) By a written agreement dated 5 January 1985 the plaintiff agreed to sell to the defendant 802,000 shares of a company called Mali Sdn Bhd ("the said shares") for the sum of RM793,980, which works out to RM0.99 per share.

(b) On the same date, *vide* another agreement the defendant and another person agreed to sell to the plaintiff and two others certain goods ("the said goods") owned by Mali Sdn Bhd for the sum of RM935,000.

(c) The plaintiff claim as its shareholding in Mali Sdn Bhd amounted to 32.08% of the issued share capital, its contribution for the purchase of the said goods would amount to RM299,948. Consequently the plaintiff agreed that the defendant can deduct the said sum of RM299,948 from the purchase price of the said shares, *viz*., the defendant would only need to pay the sum of RM494,032 for the purchase of the said shares.

(d) The plaintiff claim the defendant has breached the agreements by refusing to pay the said sum of RM494,032 and by this suit is claiming:

(i) the said sum of RM494,032;

(ii) specific performance and alternative damages;

(iii) interest at the rate of 8% per annum on the said sum of RM494,032;

(iv) costs.

The writ was served on the defendant's solicitors on 14 September 1992. On 19 September 1992 the defendant entered appearance and on 22 October 1992 filed his defence. On 22 September 1993 the learned senior assistant registrar ("SAR") heard the summons for directions and made the necessary orders.

**The 2nd Action (D3-22-228-92)**

This action ("the D3 suit") was filed on 18 February 1992. In this action the plaintiffs' claim is as follows:

(a) By an agreement dated 21 December 1984 ("the 1st agreement") the 1st plaintiff agreed to purchase from the 1st defendant 888,000 shares of the said Mali Sdn Bhd for the sum of RM879,120. The purchase price has been fully paid by the 1st plaintiff to the 1st defendant.

(b) By an agreement dated 19 December 1984 ("the 2nd agreement") the 2nd plaintiff agreed to purchase from the 2nd defendant 810,000 shares of the said Mali Sdn Bhd for the sum of RM801,900. The purchase price has been fully paid by the 2nd plaintiff to the 2nd defendant.

(c) By an agreement dated 5 January 1985 ("the 3rd agreement") the 1st plaintiff agreed to purchase from the 3rd defendant 802,000 shares of the said Mali Sdn Bhd for the sum of RM793,000. The 1st plaintiff has paid to the 3rd defendant a sum of RM299,948 towards the purchase price.

(d) Subsequent to the execution of the above agreements and payment of the purchase price, a search at the registry of companies revealed that contrary to the 1st agreement, the 1st defendant was not a shareholder of Mali Sdn Bhd to the extent of 888,000 shares, *viz*., his shareholding was only 500,000 shares. The said search also revealed that the 2nd defendant was not at all a shareholder of Mali Sdn Bhd.

(e) Subsequent to the execution of the above agreements and payment of purchase price, the plaintiffs discovered, contrary to the terms of the agreements, Mali Sdn Bhd had created five debentures dated 22 February 1980, 14 October 1981, 5 March 1982, 28 April 1982 and 24 April 1983 respectively in favour of a bank as security for credit facilities granted by that bank to Mali Sdn Bhd.

(f) The plaintiffs claim the defendants had failed to disclose the existence of the said debentures and in consequence thereof, the defendants were in breach of the terms of the agreements. Had the plaintiffs been aware of the said debentures, the plaintiffs would have not entered into the agreements. Pursuant to the powers contained in the said debentures, the bank had appointed a receiver and manager for Mali Sdn Bhd sometime in February 1991.

(g) By reason of the aforesaid breaches, the plaintiffs had on 16 November 1991 rescinded and terminated the agreements with the respective defendants and demanded repayment of all monies together with compensation for loss and damage as provided in the agreements but the defendants failed and/or refused to comply with the plaintiff's demand.

By this action the plaintiff are seeking the following reliefs:

(i) the 1st plaintiff claims from the 1st defendant a sum of RM1,098,900;

(ii) the 2nd plaintiff claims from the 2nd defendant a sum of RM1,002,375;

(iii) the 1st plaintiff claims from the 3rd defendant a sum of RM498,443;

(iv) the plaintiffs claim from the defendants respectively interest on the amounts above at the rate of 8% per annum calculated from the date hereof until full satisfaction;

(v) a declaration that the 1st, 2nd and 3rd agreements be and are hereby terminated and upon receipt by the plaintiffs of the sums set out above, that the stakeholders do re-deliver possession of all documents in their possession to the defendants;

(vi) that the defendants do pay damages to the plaintiffs; and

(vii) that the defendants do pay costs of this action.

The 3rd defendant entered appearance on 18 September 1992 and filed its defence on 21 October 1992. The court file shows that the 1st and 2nd defendants have been not been served with the writ. According to the writ the 1st and 2nd defendants' address of service is No. 29 Jalan SS4D/16, Petaling Jaya.

As discussed earlier, these two actions were consolidated *vide* court order dated 17 March 1993. Nothing happened from 17 March 1993 until 28 December 1995 when the following transpired:

(1) On 28 December 1995 the matter came up for mention before the learned judge who then set down the same for trial for five days commencing 14 January 1997.

(2) On 14 January 1997, counsel for the defendant (D1 suit)/plaintiffs (D3 suit) informed the court that the 2nd plaintiff has since passed away and on the basis that the deceased's estate is being handled by another legal firm, sought for a mention date in six months time. There was no objection by counsel for the plaintiff (D1 suit)/3rd defendant (D3 suit). The matter was then fixed for mention to 31 July 1997.

(3) On 31 July 1997 the matter was again adjourned for mention to 7 November 1997 on the request of the defendant (D1 suit)/plaintiffs (D3 suit).

(4) On 7 November 1997 the matter was again adjourned for mention to 16 January 1998. On 16 January 1998 the court was informed that probate had just been granted for the said deceased's estate and the matter was consequently adjourned for mention to 13 March 1998.

(5) On 13 March 1998 the learned judge, *inter alia*, noted that the defendant (D1 suit)/plaintiffs (D3 suit) has yet to file their bundle of documents for the purposes of the trial. He then ordered that party to file the said bundle of documents and to make the necessary amendment to substitute the executrix of the said deceased's estate as a party within one month failing which he will order judgment to be entered against the defendant in the D1 suit and strike out the plaintiffs' action in the D3 suit. He then fixed the matter for mention to 13 April 1998.

(6) On 13 April 1998 one Grace Poh appeared for the defendant (D1 suit)/ plaintiffs (D3 suit) and one K.K. Nga appeared for the plaintiff (D1 suit)/ 3rd defendant (D3 suit). According to the minutes of the court file, the following transpired:

(i) Grace Poh informed the court that she has filed her bundle of documents on 8 April 1998 which however did not include documents of the executrix of the estate of the 2nd plaintiff (D3 suit) as the executrix has no intention of pursuing the claim. She also pointed out the 1st and 2nd defendants in the D3 suit have yet to be served with the writ.

(ii) KK Nga pointed out that the said deceased, ie, the 2nd plaintiff in the D3 suit has not been substituted by the executrix and as such urged that that party's action be struck out with costs.

(iii) The learned judge then ordered that the 2nd plaintiff's claim in the D3 suit be struck out with costs and fixed the matter for mention to 5 June 1998.

(7) On 5 June 1998 Grace Poh requested the court to grant another mention date as her client, ie, the defendant (D1 suit)/1st plaintiff (D3 suit) was overseas and that she has not been able to get further instructions. The learned judge then granted a final date of adjournment and fixed the matter for mention to 7 August 1998.

As discussed earlier, up to then, ie, 5 June 1998 there is nothing to show that the 1st and 2nd defendants to the D3 suit have been served with the writ. However, on 17 July 1998 the defendant (D1 suit)/1st plaintiff (D3 suit) filed an application (encl. 26) praying for the following orders, namely:

(i) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1993 to 17 February 1994 to enable it to be served on the 1st and 2nd defendants;

(ii) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1994 to 17 February 1995 to enable it to be served on the 1st and 2nd defendants;

(iii) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1995 to 17 February 1996 to enable it to be served on the 1st and 2nd defendants;

(iv) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1996 to 17 February 1997 to enable it to be served on the 1st and 2nd defendants;

(v) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1997 to 17 February 1998 to enable it to be served on the 1st and 2nd defendants;

(vi) that the validity of the writ in the D3 suit dated 18 February 1992 be extended for a period of 12 months from 18 February 1998 to 17 February 1999 to enable it to be served on the 1st and 2nd defendants;

(vii) that costs of the application be costs in the cause.

Enclosure 26 was fixed to be heard before the SAR on 30 July 1998 but on that date was struck off as both parties did not appear. On 9 September 1998 the defendant (D1 suit)/1st plaintiff (D3 suit) filed an application (encl. 28) to reinstate encl. 26 which application was allowed by the SAR on

2 November 1998. Consequently on 27 November 1998 encl. 26 was heard by the SAR who allowed the application, *viz*., the validity of the writ in the D3 suit was extended from 1993 to 1999.

On 4 January 1999 all parties were informed that the trial will proceed on 16, 17 and 18 August 1999. However, on 13 February 1999 the defendant (D1 suit)/1st plaintiff (D3 suit) filed an application (encl. 30) praying for an order that the validity of the writ in the D3 suit dated 18 February 1992, which had already been extended to 17 February 1999, be extended for a further period of 12 months from 18 February 1999 to 17 February 2000. That application was struck off by the SAR on 31 March 1999. On appeal to the Judge in chambers, which was heard on 28 September 1999, the application was allowed, *viz*., the validity of the writ in the D3 suit was extended from 18 February 1999 to 17 February 2000.

Meanwhile, the trial which was due to commence on 16 August 1999 did not proceed and the matter came up for mention on 18 August 1999. On that date, counsel for the plaintiff (D1 suit)/3rd defendant (D3 suit), in the presence of counsel for the defendant (D1 suit)/1st plaintiff (D3 suit) informed the court that the dispute between them has been settled and the following order was recorded, namely, by consent without admission of liability by both parties, it was agreed that the D1 suit be fully settled without any order as to costs as follows:

(a) that the sale and purchase agreement of the said shares executed on 5 January 1985 between the plaintiff and the defendant be terminated by mutual consent;

(b) that the defendant shall pay to the plaintiff in full and final settlement the sum of RM300,000 payable by 100 equal monthly instalments of RM3,000 each, the first instalment to be paid on 15 September 1999 and thereafter on the 15th day of each subsequent month until full settlement; for this purpose, the defendant shall give six post-dated cheques for every six months period, to be handed to solicitors for the plaintiff, commencing 15 September 1999; in the event of default of any one instalment on the due date, the whole of the balance sum due from the said RM300,000 shall be immediately payable by the defendant to the plaintiff which shall be at liberty to enforce and execute the judgment for the balance forthwith.

In relation to the D3 suit, it was agreed as between the 1st plaintiff and the 3rd defendant that the action be withdrawn and struck off without any order as to costs and without liberty to file afresh.

There was a lull in the matter of the D3 suit from 18 August 1999 until 3 February 2000. However, on 3 February 2000, the 1st and 2nd defendants to the D3 suit filed an *ex parte* application (encl. 34) praying that they be

allowed to enter conditional appearance pursuant to O. 12 r. 6(1) of the Rules of the High Court 1980 ("the rules"). The ground forwarded for making the application was that they wish to challenge the extension of the validity of the writ as they are of the view that it was made not in accordance with O. 6 r. 7(2) of the rules. Order 6 r. (7)(2) of the rules read:

> Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

That application to enter conditional appearance was allowed by the SAR. As to when the writ in the D3 suit was served on the 1st and 2nd defendants is not clear as there is no affidavit of service in the court file to that effect. Consequently on 17 February 2000 the 1st and 2nd defendants filed an application (encl. 38) praying for an order that the writ dated 18 February 1992 be struck out on the ground that the extension of its validity was made contrary to O. 6 r. 7(2) of the rules. Another ground was that the extension of its validity, which is denied, was never endorsed on the writ as required under O. 6 r. 7(3) of the rules which read:

> Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has so been extended.

In the 1st and 2nd defendants' affidavit in support, the deponent, an advocate and solicitor with the firm of M/s Kumar Jaspal Quah & Aishah, acting for the 1st and 2nd defendants, contended although it was stated in encl. 26, *ie*, the application of the 1st plaintiff to extend the validity of the writ from 1993 to 1999, that the application was addressed to solicitors for the 1st and 2nd defendants, namely, M/s Kumar Jaspal Quah & Aishah, it was never served on them. It is also their stand that the extension of the validity of the writ is invalid as it was not made in accordance with O. 6 r. 7(2) of the rules. It is their stand that the validity of the writ can only be extended "from time to time for such period, not exceeding six months at any one time" whereas the 1st plaintiff was granted a total of six 12 months period "at one time". The deponent further contended that even if the extensions are held to be valid, which is denied, the writ was never marked with an official stamp in Form 5 showing the period for which the validity of the writ has so been extended as required under O. 6 r. 7(3) of the rules. The official stamp as provided under the rules is as follows:

No. 5
NOTICE OF RENEWAL OF WRIT
(O 6 r 7) (O 46 r 6)

Renewed for ... months from the ... day of ... 19 ... by an order of Court dated the ... day of ... 19 ...

Dated the ... day of ... 19 ...

...
Registrar.

The endorsements on the writ in the D3 suit in relation to the extension of its validity is as follows:

Writ Saman serentak ini adalah
dikeluarkan pada 27 JAN 1999

t.t.
NARKUNAVATHY SUNDARESON
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur.

Writ Saman serentak ini diperbaharui
selama 12 bulan dari 18/2/99 hingga
17/2/2000 melalui perintah Mahkamah
bertarikh 28/9/99.

Bertarikh ...

t.t.
...
Timbalan Pendaftar/
Penolong Kanan Pendaftar
Mahkamah Tinggi Kuala Lumpur.

It is also the stand of the 1st and 2nd defendants that the extensions have prejudiced them as they now cannot plead the defence of limitation.

In his affidavit in reply the 1st plaintiff contended his application as per encl. 26 was an *ex parte* application and hence need not be served on the 1st and 2nd defendants. He then pointed out the 1st and 2nd defendants have not identified in their application the rule that they were proceeding under to strike out the writ. In relation to the averment that there has been non-compliance of O. 6 r. 7(3) of the rules, the 1st plaintiff replied he had done so and to support that contention introduced in his affidavit the following, which from the court records have yet to be filed:

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR (BAHAGIAN DAGANG)**

**GUAMAN NO: D1-22-241-92**

ANTARA

LEPANG ENTERPRISE SDN BHD ... PLAINTIF

DAN

GOH AH LUN ... DEFENDAN

DIGABUNGKAN DENGAN
**GUAMAN NO: D3-22-228-92**

ANTARA

1. GOH AH LUN
2. GOH BOON KIM ... PLAINTIF-PLAINTIF

DAN

1. ANG BOON TIAN
2. TAN HEE WAN (P)
3. LEPANG ENTERPRISE SDN BHD ... DEFENDAN-DEFENDAN

**NOTIS PEMBAHARUAN WRIT**

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1993 hingga 17 haribulan Februari 1994;

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1994 hingga 17 haribulan Februari 1995;

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1995 hingga 17 haribulan Februari 1996;

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1996 hingga 17 haribulan Februari 1997;

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1997 hingga 17 haribulan Februari 1998; dan

Diperbaharui selama 12 Bulan dari 18 haribulan Februari 1998 hingga 17 haribulan Februari 1999.

Bertarikh pada: 10 DEC 1998

t.t.
...
NORIZA BT SAMDIN
Timbalan Pendaftar/Penolong Kanan Pendaftar.

The 1st plaintiff contended he has complied with the rules when he made his application as per encl. 26 and that he would be the party who would be prejudiced if the application to strike out made by the 1st and 2nd defendants is allowed. He then stated the outcome of the D3 suit will also decide the outcome of four other actions which are currently being stayed, namely:

(a) Mahkamah Tinggi Kuala Lumpur D2-22-2127-90
*United Malaysian Enterprise Sdn Bhd v. 1. Goh Ah Lun 2. Goh Boon Kim*;

(b) Mahkamah Tinggi Kuala Lumpur D3-22-2128-90
*David Jackson Tan v. 1. Goh Ah Lun 2. Goh Boon Kim*;

(c) Mahkamah Sesyen Kuala Lumpur 52-2936-90
*Tsoa Sui Lan v. 1. Goh Ah Lun 2. Goh Boon Kim*;

(d) Mahkamah Seysen Kuala Lumpur 52-2937-90
*Li Seng Min Co (M) Sdn Bhd v. 1. Goh Ah Lun 2. Goh Boon Kim*.

The application of the 1st and 2nd defendants, *viz*., encl. 38 was dismissed by the SAR on 20 October 2000 and against that decision they appealed to the judge in chambers. I had on 23 February 2001 allowed the appeal with costs and against that decision the 1st plaintiff has appealed to the Court of Appeal.

From the facts discussed above, what is clear is that the only suit left in the matter is the D3 suit and the parties left in that suit would be the 1st plaintiff (hereafter referred to as "the plaintiff") and the 1st and 2nd defendants. The SAR had on 27 November 1998 allowed the plaintiff's application for six consecutive extensions of the validity of his writ of summons dated 18 February 1992. The 1st and 2nd defendants had *vide* encl. 38 sought to strike out the said writ of summons. I would think the question before me at this appeal is whether the extensions granted under the circumstances has caused any injustice to the 1st and 2nd defendants. If it was so, should I exercise the inherent power of the court and make the necessary order to prevent such injustice?

At the appeal before me counsel for the 1st and 2nd defendants submitted the cause of action against them is for breach of contract but there is however no specific date of the discovery of the breach found in the statement of claim. Counsel contended giving the plaintiff the benefit of the doubt, he would take the latest date as mentioned in the statement of claim as that of discovery, ie, accrual of the cause of action, and that being in November 1991. He pointed out the plaintiff made his application to extend the validity of the writ in July 1998 – it was filed on 17 July 1998 – and the affidavit in support is dated 15 July 1998. Counsel argued the application is clearly made after the

limitation period for the action has set in and that it is settled law that applications for extension of validity of a writ which are made after the limitation period has set in is clearly not allowed. At the same time, the plaintiff chose to apply to extend the validity of the writ in six successive renewals in one single application to bring the writ up to date. On this point, counsel again submitted there is abundance of authorities that clearly state that the court has no power to grant such successive renewals of a writ. He then insisted as the plaintiffs' writ of summons is clearly erroneous, it should be struck out with costs.

Order 6 r. 7(1) and (2) of the rules read:

> (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months, beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.
>
> (2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

In *Lim Wan Hooi v. Ismail Hassan* [1965] 2 MLJ 101 the plaintiff sought to apply for an order that his writ be renewed whilst the defendant applied for an order that the writ be set aside. The action was for damages arising out of the death of one Wong Yang Cheong on 5 May 1961. The writ was filed on 9 November 1963. In October 1964 the plaintiff applied for substituted service. The hearing of the application for substituted service was fixed for 23 November 1964 before the assistant registrar and it was granted. Hashim J held as the application for renewal was made after the expiration of twelve months from the date of the writ and as the claim had become barred by limitation, the application must be refused. At p. 103 the learned judge said:

> I would only refer to a passage in *The Annual Practice* 1957 at page 60 which reads:
>
> > Although the court has power to enlarge the time under O. 64 r. 7 the practice is not to do so after the expiration of twelve months from the date of the writ, or of six months from the date of last renewal, where, but for such enlargement of time, the plaintiff's claim would be barred.

In *Lee Kah Hong & Anor v. Teoh Tiang Guan & Anor* [1971] 2 MLJ 223, the main question that arose for consideration is whether the court should exercise its discretion to enlarge the time for renewal of the writ under the following circumstances:

(a) when the period of twelve months under O. 8 r. 1 has expired; and

(b) when the plea of limitation under s. 7(5) of the Civil Law Ordinance, 1956, has already accrued.

Syed Agil Barakbah J held the discretion to renew the writ and enlarge the time would not be exercised in the plaintiff's favour as to do otherwise would deprive the second defendant of the benefit of a limitation which had accrued well before the application for extension was made. The learned judge said (at p. 224):

> A similar question was decided by the Court of Appeal in *The Firm of T. AR. CT. v. The Firm of S.N.S.AR.N*. This was a case concerning a loan of money payable on demand. A specially indorsed writ was served on the defendants after it has expired. The defendants entered a conditional appearance without prejudice to set aside the said writ and the service thereof. The plaintiffs applied *ex parte* for renewal of the writ for a period of six months and that the time for the making of the application be enlarged. An order giving effect to this application was made but later set aside on the ground that it was not served after the expiration of twelve months from the date of the said writ. Further, the claim was statute barred prior to that date under the Limitation Ordinance. Buhagiar J in the court of first instance was faced with the conflicting decisions of the Court of Appeal in England in *Holman v. George Elliot & Co Ltd*, and *Battersby & Others v. Anglo-American Oil Co Ltd & Others*, and he followed the latter decision. It was upheld by a full Court of Appeal. Matthew CJ (as he then was) at page 74, said as follows:
>
> > ... So soon as the question of limitation was raised, the judge hearing the application had to consider whether the renewal of the writ and the enlargement of time would have the effect of depriving the defendants of a statutory defence. He applied the principles laid down in *Battersby v. Anglo-American Oil Co Ltd*, and he came to the conclusion, rightly in my view, that he should exercise his discretion not to renew the writ and enlarge the time, as to do otherwise would deprive the defendants of a legal defence.

In *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v. QBE Insurance (International) Ltd* [1989] 1 MLJ 1, the Court of Appeal (Singapore) held, *inter alia*, that the court's power under O. 6 r. 7 is limited to extending the validity of the writ for a maximum of 12 months at any one time. This means that an application for renewal must be made at the latest within 12 months of the expiry of the writ. There is no power to grant two or more successive renewals to bring the writ up to date. Wee Chong Jin CJ, in delivering the judgment of the court said (at p. 2):

> We accepted the respondent's contention that the court's power under O 6 r 7 is limited to extending the validity of the writ for a maximum of 12 months at any one time. This means that an application for renewal must be made at

the latest within 12 months of the expiry of the writ. There is no power to grant two or more successive renewals to bring the writ up to date.

> In our judgment, this is the logical construction of the rule as the court can extend the validity of the writ only for a maximum of 12 months at any one time. This construction is also supported by authority.

In *Player v. Bruguiere*, which was heard together with *Chappel v. Cooper*, the writ was issued on 6 December 1974. The plaintiffs did not apply for leave to extend the validity of the writ until 13 June 1979. The Court of Appeal refused to grant the extension sought. Delivering the leading judgment, Roskill LJ, at p 469, referred to RSC O. 6 r. 8(2) which is equivalent to our O. 6 r. 7(2), and went on to say:

> Let me give the dates. The writ in the action ... was issued on 6 December 1974. The 12 months therefore expired on 5 December 1975, and **the second period of 12 months, which would be the maximum for which a timeous extension might be allowed**, would have run out on 5 December 1976. But the affidavit in support of this application was not sworn until 13 June 1979, some 3 1/2 years after that last date. In view of those dates, it seems to me clear, with all respect to counsel for the plaintiff, beyond doubt we have no power under the rules to grant the extension sought. (emphasis added).

In this application before me, which came by way of appeal, the 1st and 2nd defendants have applied for an order that the writ be struck out on the ground that its validity was made contrary to O. 6 r. 7(2) of the rules. That rule provides where a writ has not been served on a defendant, the court may extend by order extend the validity of that writ from time to time for such period not exceeding 12 months at any one time. The learned chief justice in *The Official Receiver, Liquidator Of Jason Textile Industries Pte Ltd v. QBE Insurance (International) Ltd*, referred to above, was of the view that this means that an application for renewal must be made at the latest within 12 months of the expiry of the date and that there is no power to grant two or more successive renewals to bring the writ up to date. In the instant case the plaintiff, in the words of counsel for the 1st and 2nd defendants, "chose to apply to extend the validity of the writ in six successive renewals in one single application to bring the writ up to date". That being the situation, counsel for the 1st and 2nd defendants insisted that the extension for the validity of the writ was made contrary to O. 6 r. 7(2) of the rules.

In reply to the arguments above, counsel for the plaintiff referred to the case of *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773 wherein the Court of Appeal held that under O. 6 r. 7 of the rules, the court has jurisdiction to extend a writ even after its expiry and whether that jurisdiction ought to be invoked in a given case is a matter within the jurisdiction of the

court hearing an application to extend. It was also held that quite apart from O. 6 r. 7 of the rules, there is wide power under O. 3 r. 5 of the rules conferred upon the High Court to extend time. Order 3 r. 5 of the rules read:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in para. (1) although the application for extension is not made until after the expiration of that period.

It was also held in that case that even the restriction on granting more than one extension of 12 months expressed in O. 6 r. 7 may, in appropriate cases, be overcome by having resort to O. 92 r. 4 which reserves the inherent power of the court to make order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. Order 92 r. 4 of the rules read:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In *Arab-Malaysian Credit Bhd v. Tan Seang Meng* the plaintiff made eight separate and distinct *ex parte* applications by each of which it is sought for and obtained a 12 month extension. The total of all those extensions would have the desired effect of bringing back to life the expired writ. On being served with the extended writ, the defendant entered conditional appearance and applied to set aside the several orders of extension. The SAR refused the application but on appeal the judge allowed the appeal and discharged all the eight extension orders. The judge held that the court did not have the jurisdiction to make such an extension. On appeal, the Court of Appeal held that the court has such jurisdiction and remitted the defendant's application back to the High Court to be decided on the merits.

I would think the facts in *Arab-Malaysian Credit Bhd v. Tan Seang Meng* are quite different from the facts that are before me. In that case the plaintiff made eight separate and distinct applications by each of which is sought for and obtained a 12 month extension. The total of all those extensions had the desired effect of bringing back to life the expired writ. All those eight applications were made by *ex parte* summonses in accordance with the procedure laid down in the rules. In the instant case, the plaintiff only made one application and requested therein a total of six consecutive extensions. From my reading, that would be contrary to O. 6 r. 7(2) which clearly provides the court may by order extend the validity of the writ from time to time for such period not exceeding twelve months at any one time. To me, the words "from time to time" and "at any one time" would denote for each period of

extension which must not exceed twelve months, there must be a distinct and separate application. In the instant case, the plaintiff sought for and was granted six extensions of twelve months each in one application. That, to me, would clearly contravene O. 6 r. 7(2) of the rules and I would agree with the learned chief justice in *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v. QBE Insurance (International) Ltd* that the court's power under O. 6 r. 7 is limited to extending the validity of the writ for a maximum of 12 months at any one time. To rule otherwise would allow plaintiffs to file their writs and not serve it, let it expire for as long as they desire and for whatever reasons notwithstanding several years have elapsed and then make an application to extend its validity when it suit their convenience even though statutory limitation would have set in by then.

The plaintiff has also insisted that his application was an *ex parte* application but the application itself shows otherwise. There is nothing in the enclosure itself, ie, the summons in chambers to denote that it was an *ex parte* application - it was simply entitled "saman dalam kamar". Further, the summons was specifically addressed to:

(a) solicitors for the plaintiff and the 3rd defendant in the D1 suit and the D3 suit respectively; and

(b) solicitors for the 1st and 2nd defendants in the D3 suit.

It is not disputed that solicitors for the 1st and 2nd defendants were not served with the summons. I cannot fathom the stand of the plaintiff that by not serving the summons would denote that it was an *ex parte* application. The contention that it was an *ex parte* application cannot also hold water as the minutes of the SAR showed that at the hearing of the summons, counsel for the plaintiff informed the court that the plaintiff in the D1 suit which is also the 3rd defendant in the D3 suit has no objections to the application. That, to me, would clearly denote that the application was not an *ex parte* application as insisted by counsel for the plaintiff.

On the whole, even if I am wrong in my reading of O. 6 r. 7(2), *viz*., that consecutive extensions cannot be granted in one single application, I would reiterate my view that the question before me at this appeal is whether the extensions granted under the circumstances has caused any injustice to the 1st and 2nd defendants. I would think so. As discussed earlier, the 1st and 2nd defendants' address for service as stated in the writ was an address in Petaling Jaya which is within Malaysia. As to why service of the writ could not be effected during its first life span of one year was not clearly explained. The plaintiff later claimed that the 1st and 2nd defendants were not within the country but why that prevented them from renewing the writ upon its expiry was also not clearly explained. Both the actions were consolidated *vide* court order on 17 March 1993 and the writ by then had expired as far as the

1st and 2nd defendants were concerned. The matter again came up before the court on 28 December 1995, 14 January 1997, 31 July 1997, 7 November 1997, 16 January 1998, 13 March 1998, 13 April 1998 and 5 June 1998. Notwithstanding that, the records show the plaintiff did not make any attempt to renew the writ then. He then filed his application for renewal of the writ on 17 July 1998 and upon doing so addressed the summons, *inter alia*, to solicitors for the 1st and 2nd defendants. The application was granted. Even then the writ was not served and the validity of the writ was again extended from 18 February 1999 to 17 February 2000, ie, a period of twelve months. As to when the writ was served upon the 1st and 2nd defendants, as discussed earlier, is not clear. Looking at the circumstances, I would think the plaintiff is guilty of undue delay. Further, on the facts, by the time the first application was made for renewal – it was filed on 17 July 1998 – the claim had become barred by limitation. It is the plaintiff's case, as per his statement of claim, that he rescinded the said agreements on 16 November 1991. His cause of action is for breach of contract. Section 6(1)(a) of the Limitation Act 1953 (Act 254) provides, *inter alia*, an action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. I am of the view that grave injustice has been caused to the 1st and 2nd defendants when the writ was renewed as they have been deprived of the benefit of a limitation which had accrued well before the application for extensions were made.

I had, when the application by the 1st and 2nd defendants to strike out the writ as against them came up before me on appeal, overturned the decision of the SAR and allowed the application. I ordered so as I am of the view that the extensions granted under the circumstances have caused an injustice to the 1st and 2nd defendants. They have been deprived of a statutory defence. There was a clear delay on the part of the plaintiff. He has not clearly explained why he did not actively pursue the claim against the 1st and 2nd defendants from 1992 to 1999. His stand that the outcome of the D3 suit would also decide the outcome of four other actions has not been clearly explained. No details were given. As to how those actions would have a bearing on the D3 suit is not clear at all. Furthermore he has not complied with O. 6 r. 7(3) of the rules, *viz.*, the writ that was served on the 1st and 2nd plaintiffs after its validity was extended was not endorsed in accordance with that rule and that requirement, which is mandatory, cannot be overcome by introducing the said "notis pembaharuan writ", discussed earlier, as an exhibit to an affidavit in reply (encl. 39). Thus, to prevent injustice, I exercised the inherent power of the court and ordered that the writ as against the 1st and 2nd defendants be struck out with costs.